**TAN SRI DATUK DR MOHAN SWAMI & ANOR**

**v.**

**MISL & ASSOCIATES SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-973-2003]
7 JULY 2003

***LEGAL PROFESSION:*** *Retainer - Change of solicitor - Whether second plaintiff's change of solicitor permissible - Whether there was conflict of interest between plaintiffs - Whether justiciable for second plaintiff to be represented by separate counsel*

The plaintiffs had applied for, and were granted, an *ex parte* injunction against the defendant with the usual undertaking as to damages. However, before the *inter partes* hearing commenced, counsel for the defendant, one Mr. Wong, raised a preliminary objection against one Mr. Wang and one Mr. Woo appearing for the second plaintiff for the following reasons: (1) that both the plaintiffs were represented by one firm of solicitors, namely, Messrs. Shook Lin & Bok, but Mr. Wang and Mr. Woo were not from that law firm; and (2) that where there were several plaintiffs, the law was said to be clear in that they can only be represented by one firm of solicitors and by the same counsel, except with the leave of the court in exceptional circumstances. Mr Wong's concern was motivated by the fact that when the *ex parte* injunction was granted, both the plaintiffs were represented by Dato' Dr. Cyrus V. Das and Mr. K. Mohan, who were from the law firm of Messrs. Shook Lin & Bok.

**Held:**

**[1]** As a general rule, a person has the legal right to retain the counsel of his own choice provided that said counsel is ever willing to act and is not precluded by any law from doing so. The act of authorising or employing a counsel to act on behalf of a particular client constitutes, in law, the counsel's retainer by that client. Hence, the second plaintiff's decision to engage Mr. Wang to act for him was permissible and perfectly in order, and there was no necessity to file a formal application to this court for separate representation. (p 620 a & e)

**[2]** On the facts, the defendant had entered into a separate agreement with the second plaintiff of which the plaintiff was unaware, and this gave rise to a divergence of legal interests between both the plaintiffs. Therefore, as a result of this conflict of interest, the justice of the case demanded that separate counsel be called to represent the second plaintiff during the *inter partes* hearing, and Mr. Wang fit the bill perfectly. (pp 622 h & 623 a-c)

*[Preliminary objection dismissed.]*

**Case(s) referred to:**

*Adams v. London Improved Motor Coach Builders Ltd [1921] 1 KB 495* ***(refd)***
*Bird v. Harris [1881] WN 5* ***(refd)***
*Bolden v. Nicholay [1857] 3 Jur NS 884* ***(refd)***
*Goold and Porter Proprietary Ltd v. Housing Commission [1974] VR 102* ***(refd)***
*Healey v. A Waddington & Sons LD CB Allot & Son (A firm), And National Coal Board [1954] 1 WLR 689* ***(refd)***
*Lewis & Anor v. Daily Telegraph Ltd (No 2) [1964] 2 QB 601* ***(refd)***
*Nocton v. Lord Ashburton [1914] AC 932* ***(refd)***
*Oswald Hickson Collier & Co v. Carter-Ruck [1982] 126 Sol Jo 120* ***(foll)***
*Owen v. Ord [1828] 3 C & P 349* ***(refd)***
*Re Burford, Burford v. Clifford [1932] 2 Ch 122* ***(refd)***
*Re Galland [1885] 31 Ch D 296* ***(refd)***
*Rowe v. Ward [1844] 4 LTOS 191* ***(refd)***
*Spector v. Ageda [1973] Ch 30* ***(refd)***
*Tomlinson v. Gell [1837] 6 Ad & El 564* ***(refd)***
*Wiggins v. Peppin [1839] 2 Beav 403* ***(refd)***

**Legislation referred to:**

Legal Profession Act 1976, ss. 35(1), 114(1), 116(1)
Rules of the High Court 1980, O. 5 r. 6(2), O. 12 r. 1, O. 15 r. 4

**Other source(s) referred to:**

*The Supreme Court Practice,* 1999 edn, vol 1, p 213

*For the 1st plaintiff - Cyrus V Das (K Mohan & Brian Jit Singh); M/s Shook Lin & Bok*
*For the 2nd plaintiff - Wang Kuo Shing (Woo Kai Hung); M/s Shook Lin & Bok*
*For the defendant - Wong Chong Wah (Lim Hong Sang & Lim Koon Huan); M/s HS Lim & Malik*
*Watching brief for Ong Seang San - Christopher Leong (TS Lim); M/s Chooi & Co*

*Reported by Suresh Nathan*

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## JUDGMENT

**Abdul Malik Ishak J:**

**Introduction**

On 13 June 2003, I granted, on the application of the plaintiffs by way of b an *ex parte* summons in chambers as reflected in encl. 3, an *ex parte* injunction in favour of the plaintiffs with the usual undertaking as to damages. That *ex parte* injunction was against the defendant and it was couched in this manner (see the order in encl. 7):

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(a) the Defendant be restrained whether by itself, its agents or howsoever from selling, transferring or otherwise dealing with all or any of the 62,562,500 ordinary shares in Sitt Tatt Berhad, free of moratorium, registered in the name of the Defendant save and except in accordance with the Agreements dated 12.9.2001 and 12.9.2002 entered into between the Plaintiffs and the Defendant.

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(b) the Defendant be restrained whether by itself, its agents, servants or howsoever from acting in any manner inconsistent with the express/ implied terms of the said Agreements and be further restrained from altering or changing the structure or composition of the Board of Directors of Sitt Tatt Berhad.

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(c) The *inter partes* hearing be fixed for 2nd July, 2003.

Dated this 13th day of June, 2003.

On 2 July 2003, the *inter partes* hearing was heard. But before it got off the ground, Mr. Wong Chong Wah, the learned counsel for the defendant f raised a preliminary objection. It was framed and phrased in this way. He objected to Mr. Wang Koo Shing ("Mr. Wang") and Mr. Woo Kai Hung ("Mr. Woo") appearing for the second plaintiff for the following reasons:

(a) that both the plaintiffs were represented by one firm of solicitors, g namely, Messrs Shook Lin & Bok but Mr. Wang and Mr. Woo were not from that law firm; and

(b) that where there are several plaintiffs, the law is said to be clear in that they can only be represented by one firm of solicitors and by the same counsel except with the leave of court in exceptional h circumstances.

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Mr. Wong Chong Wah ("Mr. Wong") was quite perturbed that the second plaintiff was represented by Mr. Wang and Mr. Woo. Mr. Wong's concern was motivated by the fact that on 13 June 2003 when I granted the *ex parte* injunction, both the plaintiffs were represented by Dato' Dr. Cyrus V. Das and Mr. K. Mohan who were from the law firm of Messrs. Shook Lin & Bok. Mr. Wong must have expected that these two learned counsel in the persons of Dato' Dr. Cyrus V. Das and Mr. K. Mohan from the law firm of Messrs. Shook Lin & Bok would be representing both the plaintiffs on 2 July 2003. But, alas, events showed that on 2 July 2003, only the first plaintiff was represented by Dato' Dr. Cyrus V. Das who was assisted by Mr. K. Mohan and Mr. Brian Jit Singh and they were from the law firm of Messrs. Shook Lin & Bok. While both Mr. Wang and Mr. Woo represented the second plaintiff on 2 July 2003. Both the plaintiffs still retained the services of the law firm of Messrs. Shook Lin & Bok.

No notice of the preliminary objection was ever given to either the first plaintiff or the second plaintiff. Yet the parties were willing to argue the preliminary objection before me. I listened to them attentively and I too wrote copiously.

**The Preliminary Objection**

Mr. Wong referred to me a passage appearing in the White Book. It was a faxed copy and under caption of, "Joinder of plaintiffs without leave", and he referred to me this passage:

> If persons are joined as plaintiffs in the proceedings, they are not entitled, as a general rule, to separate legal representation: *Lewis v. Daily Telegraph* [1964] 2 QB 601. See also *The Bosworth* [1961] 1 WLR 312.

Mr. Wong also referred to me the case of *Lewis And Another v. Daily Telegraph Ltd. (No. 2)* [1964] 2 QB 601, CA. That was a decision emanating from the Court of Appeal with a coram comprising of Sellers, Pearson and Russell LJJ and Mr. Wong referred to me a passage that appeared at p. 619 of the report which reads:

> In my view, it was not regular, and not in accordance with the proper practice, that two firms of solicitors should be placed on the record as representing the plaintiff Lewis and the plaintiff company separately.

a And here before me now, the first plaintiff was represented by a firm of solicitors known as Messrs. Shook Lin & Bok while the second plaintiff too was represented by the same firm of solicitors. That was perfectly in order. What troubled Mr. Wong was the fact that one learned counsel acted for the first plaintiff while another learned counsel acted for the second b plaintiff. This according to Mr. Wong was wrong and cannot constitute "proper practice". Mr. Wong submitted that in the normal circumstances if separate representation was going to be sought, then an application must be made to this court and it would be up to this court to decide whether there were exceptional circumstances to allow separate representation. Mr. c Wong also referred to the case of *Goold and Porter Proprietary Limited v. Housing Commission* [1974] VR 102, a decision of the Supreme Court of Victoria, and he read the relevant passages that appeared in the judgment of Norris J, particularly the following passages (see [1973] VIC LEXIS 120):

d > There seems to be a long line of authority to the effect that plaintiffs, where there is more than one plaintiff in an action, must appear by the same counsel. The cases seem very largely to be equity cases but the matter is stated categorically in the authorities (*Wedderburn v. Wedderburn* [1853] 17 Beav 158; *Davey v. Watt* [1902] 28 VLR 24; *Lewis v. Daily Telegraph* [1964] 2 QB 622; [*4] [1964] 1 All ER 705; *Odgers on Pleading and* e *Practice*, 18th edn, p. 16; *Halsbury*, 3rd edn, vol. 3, p. 72; *Newton v. Ricketts* [1848] 2 Phil 624; *Ballard v. White* [1843] 2 Hare 158, at p. 159; *Swift v. Glazebrook* [1842] 13 Sim 185; *Re Norwoods Patents* [1895] 11 RPC 214, at p. 221; *Re Wright* [1895] 2 Ch 747 at p. 748) to which I have been referred, including one in this court which was decided by f Holroyd, J, *Davey v. Watt* [1902] 28 VLR 24; 8 ALR 90.
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> In *Lewis v. Daily Telegraph (No. 2)* [1964] 2 QB 601, at p. 623; [1964] 1 All ER 705, there is a dictum of Russell, LJ, which does indicate his Lordship's view that where there are a number of plaintiffs in an action, whether that action is a consolidated action or not, there is a discretion g to allow separate representation to the plaintiffs. But that appears, on a review of the authorities by counsel, to be the only reference to the possibility in an action of this kind which is not a consolidated action, [*5] of plaintiffs appearing by separate counsel. The condition of the plaintiffs so doing is stated to be to avoid injustice, and his Lordship indicates that it must be rare.
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> h In the absence of any other authority suggesting that there is a discretion, I am disposed to the view that there is no discretion in the case of an action which is not a consolidated action, and that, therefore, I should refuse the application which has been made by Mr. Marks and by Mr.

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> Eames, for the plaintiffs, in this action, or some of them, to appear by separate counsel. I say 'or some of them' because some of the plaintiffs are not here at this moment, either in person or by solicitor or counsel, so I am told. However that may be, and assuming that I have a discretion, I am of the opinion that no injustice would be done to the plaintiffs by requiring them all to appear by the same counsel. I am satisfied that the only conflict that might arise between them is not related in any way to the relief sought in the action; it might well be that different considerations would actuate different plaintiffs in certain eventualities but those eventualities, which I do not more particularly refer to, seem to me to [*6] have nothing to do with the actual conduct of the action as it appears on the pleadings. And I think that the interests of the plaintiffs to the extent that they may differ, could be well looked after by solicitors or solicitors and counsel who are not appearing in the action, and they do not have anything to do with the conduct of the action.

In fact, Mr. Wong referred to the whole judgment of Norris J, which I had just reproduced, and Mr. Wong too also highlighted the speech of Norris J couched in the following salient terms:

> But while parties remain co-plaintiffs it would seem they must appear by the same practitioner according to the general rule stated by Romilly, MR, in *Wedderburn v. Wedderburn* [1853] 17 Beav 158, at p. 159. See in addition the cases cited in argument and those I have already mentioned *Peareth v. Peareth* [1858] Johns 58, and *Re Norwich and Norfolk Provident Permanent Building Society* [1874] WN 168; 22 WR 857. Ruling accordingly.

Dato' Dr. Cyrus V. Das, for the first plaintiff, took centre stage when he disagreed with the submissions of Mr. Wong. He submitted that he disagreed with Mr. Wong's submissions that legal representation by separate counsel to argue for two separate plaintiffs can only be by special application to court and leave obtained. He pointed out that a distinction must be maintained between a legal representation through a firm of solicitors and counsel in court. He emphasised that the distinction between a corporation appearing in court as a plaintiff and an individual as a plaintiff was very material because of our Rules of the High Court 1980 ("RHC"). He cited O. 12 r. 1 of the RHC and he said that it referred to "defending". He said that for instituting an action it would be O. 5 r. 6(2) of the RHC. He then pointed out that the law made a difference between a corporation and an individual. He emphasised that if an individual was involved, that individual could appear in person and represent himself. He then gave an analogy. It

was like this. In a case involving two plaintiffs or two defendants who are individuals but represented by the same firm of solicitors, it would be possible for one of them to say that:

> I would be my own counsel in court to argue my case but my firm of solicitors would continue as solicitors on record to file, serve and receive all processes.

Dato' Dr. Cyrus V. Das pointed out that Mr. Wong's arguments failed to distinguish between legal representation as solicitors on record and counsel appearing in court to argue. The said Dato' also submitted that it was trite that counsel appearing in court to argue for a party need not be from the same firm of solicitors who were solicitors on record for that party. The said Dato' emphasised that Mr. Wong himself would be a classic example. He submitted that Mr. Wong appeared as counsel for the defendant although the solicitors on record came from a different firm of solicitors. To be precise, the defendant was represented by a firm of solicitors known as Messrs. H.S. Lim & Malik; and Mr. Wong acted as counsel for the defendant.

According to Dato' Dr. Cyrus V. Das, the case of *Lewis* was concerned with the question of whether you could have two firms of solicitors representing the same plaintiffs. One an individual and the other a company. The said Dato' then pointed out that the answer was given in that case itself – referring to the case of *Lewis*. The answer was in the negative because according to the said Dato' if it was otherwise there would be chaos because opposite party could choose which firm of solicitors to serve the documents upon. According to the said Dato', the case of *Lewis* did not make any decisive ruling on the question of whether a separate counsel could appear for a different plaintiff although all were represented by the same firm of solicitors. According to him, one of the judges in the case of *Lewis*, namely, Sellers J had at p. 624 of the report adverted to the fact that that could be a possibility. It would certainly be ideal to reproduce in verbatim the speech of Sellers LJ in the case of *Lewis* at p. 624 of the report and I shall do so now. This was what his Lordship said:

> I can see no reason why one firm of solicitors, regularly appointed to act on behalf of both the plaintiffs, should not appear for them, and instruct counsel likewise, to appear and present the case of both of them before the court as each of them desires it presented. That would be regular.

The learned Dato' then pointed out that this kind of situation would arise in a case where the legal interests of the two plaintiffs begin to divert on some issue in the case and that having one counsel to argue for both of them when their interests were in conflict with one another would be untenable. The learned Dato' then referred to the present case at hand. He submitted that the latest affidavit from the defendant that was affirmed on 27 June 2003 – that would be the affidavit of Kor Hiang Ling as seen in encl. 9, suggested that the defendant had entered into a separate agreement with the second plaintiff only which agreement was undated, unstamped and not witnessed, and that the first plaintiff was not aware of this agreement at all. The learned Dato' then submitted that even the second plaintiff by his own admission in an affidavit that was affirmed on 2 July 2003 – referring to the affidavit of the second plaintiff as seen in encl. 12, confirmed that the first plaintiff was not made aware of this separate agreement. It was submitted by the learned Dato' that the defendant was now seeking as a ground to oppose the injunction the existence of this undated separate agreement which was said not to have been disclosed. That, according to the learned Dato', was a point that only relate to the second plaintiff and not the first plaintiff. He stressed that the first plaintiff was, all along, unaware of the existence of this very agreement. It was for these reasons that it was submitted that there was a divergence of legal interests between both the plaintiffs and that more importantly as to the legal position between the plaintiffs on this legal issue. He stressed that it might be said that there was a conflict of interest between the plaintiffs on this issue. So he submitted that it would be quite invidious and indeed untenable for the same counsel to argue for both the plaintiffs on an issue of conflict such as the present one. He further submitted that in a matter of this magnitude, the larger issue of justice must prevail so that there could be no suggestion whatsoever that the interest of one plaintiff has been subordinated to that of the other. He then submitted that the court was entitled to receive the full assistance from counsel to state the maximum position of each of the plaintiffs on the issue that this court was confronted with. In regard to the Australian case of *Goold*, Dato' Dr. Cyrus V. Das said that that case spoke of a conflict of interest that might emerge at the trial. He too said that that case – referring to *Goold*, was distinguishable because there the court was concerned with a pre-conflict situation whereas in the present case before this court the conflict of interest has already arisen. It was with those circumstances in mind that Dato' Dr. Cyrus V. Das submitted that as a matter of fairness and justice to both the plaintiffs and in order to render full assistance to this court that the arguments on their behalf be presented to this court by separate counsel. And that the same firm of solicitors,

namely, Messrs. Shook Lin & Bok would appear on record in order to ensure that there was no uncertainty as regards the service and the receiving of documents thereto.

The learned counsel for the second plaintiff in the person of Mr. Wang echoed the same sentiments as expressed by Dato' Dr. Cyrus V. Das. This was what Mr. Wang had said.

That the second plaintiff's position to appoint a separate counsel to represent him arose because of the divergence in the legal position of the first and the second plaintiffs arising from the allegation of non disclosure of an undated, unstamped agreement signed between the second plaintiff and the defendant. It was said that the first plaintiff was not a party to that agreement and has no knowledge of it. It was a matter in which only the second plaintiff was capable of providing an explanation and an answer. In fact, it was said that this undated and unstamped agreement as seen in encl. 9 of exh. "KHL1" was in conflict with the sale and purchase agreement (see exh. "TS7" of encl. 5) that was entered into between the first and the second plaintiffs as purchasers and the defendant as the vendor. It was said that this second agreement as reflected at exh. "TS7" of encl. 5 was the subject matter of the application before this court. It was submitted that arising from the sudden divergence in the legal position between the first and the second plaintiffs, the second plaintiff now entertained a doubt as to whether the same counsel representing the first and the second plaintiffs will be able to advance and present the case for the second plaintiff without compromise and without preference. It was said that because of this doubt and uncertainty that the second defendant has decided to engage a separate counsel to advance his case. So, for these reasons and under these circumstances, that it was said that the second plaintiff found it necessary to have a separate counsel in the interest of justice. It was submitted that a litigant must be confident that his counsel will advance his cause without compromise and without fear of preference to that of another litigant.

Mr. Wang emphasised that there is a clear distinction between representation by solicitors and representation by counsel. He submitted that solicitors performed procedural and administrative requirements in the proceedings such as service of documents, filing of the bundles and if there were separate solicitors representing separate plaintiffs then all these can be thrown astray. He pointed out that having separate counsel representing separate plaintiff will not pose any problem. On the contrary, he said that it will enhance

the interest of justice for the litigant concerned. In regard to the case of *Lewis,* Mr. Wang drew my attention to the judgment of Russell LJ at p. 622 to p. 623 of the report where his Lordship said:

> *Prima facie*, co-plaintiffs, whether in one original action or in an action consisting of consolidated actions, must be jointly represented by solicitor and counsel. In a proper case, an order may be made authorising severance in point of representation, but this must be, I think, rare and should only be done to avoid injustice.

Proceeding further on the same page, Russell LJ had this to say:

> At present the plaintiffs have separate solicitors on the record, and appear by separate counsel. No order permitting that has ever been made, though for the purpose of these interlocutory proceedings the court has permitted it. It seems to me that if the plaintiffs turn up at the trial and no solicitor and counsel can say that they appear for both the plaintiffs, and no order permitting separate representation has been made, their case cannot be opened and the two actions will be dismissed.

Mr. Wang then referred to the case of *Goold.* He said that Mr. Wong used this case to say that the court has no discretion to allow separate counsel to represent different plaintiff. Mr. Wang took exception and he said that the case of *Goold* cannot supercede the case of *Lewis* especially concerning the position of an interlocutory proceeding. Mr. Wang pointed out that the case of *Goold* only dealt with the situation at the trial.

Mr. Wang then referred me to the case of *Healey v. A. Waddington & Sons LD., C.B. Allot & Son (A FIRM), And National Coal Board* [1954] 1 WLR 689, a decision of the Court of Appeal with the coram comprising of Singleton, Jenkins and Hodson LJJ, where there was a different position from one plaintiff from that of another and the court there considered the question of separate counsel representing separate plaintiff. And using the case of *Healey* as a leverage, Mr. Wang submitted that in the instant case there was a clear divergence of the legal position between the two plaintiffs and so he said that in the interest of justice separate counsel should be allowed to represent the second plaintiff in order to advance his case in these proceedings. Mr. Wang then implored me not to accede to Mr. Wong's preliminary objection and to allow him – referring to Mr. Wang, to represent the second plaintiff in these proceedings.

By way of a rebuttal, Mr. Wong for the defendant referred me to "*The Supreme Court Practice*" 1999 edn, at vol. 1, at p. 213 which carried the following write-ups:

> Intending co-plaintiffs should make sure that no conflict of interest, nor any division of opinion between themselves is likely to arise, for co-plaintiffs will not be allowed to sever or take inconsistent steps and must appear at the trial by the same solicitor and counsel (*Re Mathews* [1905] 2 Ch. 460; *Re Wright* [1895] 2 Ch. 747) even though they become co-plaintiffs under an order for the consolidation of two or more actions (*Lewis v. Daily Telegraph Ltd (No. 2)* [1964] 2 QB 601, CA) and quarrelling in face of the enemy is highly undesirable; …

Mr. Wong submitted that in the case of *Lewis* there were separate actions and parties applied to consolidate and then later one of the parties applied for de-consolidation. Whereas in the instant case, the facts were entirely different. Here, he said that Messrs. Shook Lin & Bok represented both the plaintiffs. He then said that both the plaintiffs were saying that even though they are being represented by the same firm of solicitors, yet the second plaintiff was entitled to be represented by a separate counsel. According to both the plaintiffs that was perfectly alright. But Mr. Wong said that to him that cannot be right. Mr. Wong, once again, referred to the case of *Lewis* and he referred to p. 619 to p. 620 of the report where Pearson LJ said:

> The rule is clearly stated in *Wedderburn v. Wedderburn*, where Sir John Romilly MR said (17 Beav. 158, 159): 'Mr. and Mrs. Hawkins may, in concurrence with the other four co-plaintiffs, remove their solicitor, and the other four may allow him to conduct the proceedings for all. But if the plaintiffs do not all concur, Mr. Hawkins cannot take a course of proceeding different and apart from the other plaintiffs, for the consequence would be, that their proceedings might be totally inconsistent. When persons undertake the prosecution of a suit, they must make up their minds whether they will become co-plaintiffs; for if they do, they must act together. I cannot allow one of several plaintiffs to act separately from and inconsistently with the others'.

Continuing further at the same page, Pearson LJ said:

> I am not saying that it would be impossible ever in any case to have separate representation, wholly or partially, in a consolidated action. It is not very easy to envisage such cases; but they can arise, and an illustration is *Healey v. A. Waddington & Sons Ltd* [1954] 1 WLR 688; [1954] 1 All ER 861n., CA. In that case eight actions were consolidated as to the issue

> of liability but separate representation was allowed as to the issue of damages. That is an interesting case, and it shows the possibility of at any rate partial separate representation in consolidated actions. But it is, in my view, not a good guide or a good precedent for the present case, because there the trials were going to be by judge alone and were in respect of an accident, whereas here we are faced with an action or actions for libel to be tried by judge and jury. It would be extremely inconvenient and awkward, so far as one can see, to have any separate representation in a matter of that kind. Many difficult problems would arise.

Mr. Wong was full of enthusiasm. He reiterated that the facts in the instant case were different. He highlighted the facts in the present case in this way. The same firm of solicitors filed the action and obtained an *ex parte* injunction. The two plaintiffs had chosen from the very beginning to have the same firm of solicitors and presumably to have the same counsel. They suddenly realise that there could be a divergent of facts. Mr. Wong expressed his view that there was no divergence of the law. He then said that the second plaintiff has signed an agreement and the first plaintiff turned around and say that he did not know of that agreement. At this point, Mr. Wong sarcastically remarked that one of them could be right but both cannot be right. So, Mr. Wong pointed out that it goes to their credibility. In serious tone, Mr. Wong pointed out that when parties come before this court for an *ex parte* injunction, the parties were expected to know the basis and the facts upon which such an *ex parte* injunction had been prayed for and obtained. He submitted that it was not right for both the plaintiffs to say that such a terrible thing has happened simply because the defendant has made such an allegation. He said that that cannot be the basis for an *ex parte* injunction to be applied for. He submitted that the second plaintiff had not made out any exceptional circumstances for this court to exercise its discretion in favour of both the plaintiffs. He then prayed that the preliminary objection be acceded to by this court.

Dato' Dr. Cyrus V. Das advanced a brief response. He said that "*The Supreme Court Practice*" 1999 edn, at vol. 1 at p. 213 which Mr. Wong relied upon was a commentary on joinder of parties under O. 15 r. 4 and not on representation of parties which was the issue before this court. He then submitted that that commentary was strictly not applicable.

**Analysis**

I have considered the lengthy submissions of the parties in regard to the preliminary objection and I have this to say.

As a general rule, a person has the right nay the legal right to retain the counsel of his own choice provided that that counsel is ever willing to act and is not precluded by any law from so doing. It is more in the nature of a retainer. The act of authorising or employing a counsel to act on behalf of a particular client constitutes, in law, the counsel's retainer by that client. It is entirely the choice of the client to decide which counsel to retain. That retainer constitutes a contract for the counsel's employment. And whatever the rights and liabilities of the parties under that contract will depend on the terms which they have expressly agreed.

On 13 June 2003, both the plaintiffs took the services of the law firm of Messrs. Shook Lin & Bok and engaged Dato' Dr. Cyrus V. Das as their counsel in order to obtain the *ex parte* injunction from this court. Both the plaintiffs were entitled to retain the law firm of Messrs. Shook Lin & Bok and they too were entitled to engage the services of the learned counsel in the person of Dato' Dr. Cyrus V. Das.

On 2 July 2003, both the plaintiffs still retained the law firm of Messrs. Shook Lin & Bok as their solicitors but they decided to engage a different counsel to advance their interests before this court. The first plaintiff still retained the services of the learned counsel in the person of Dato' Dr. Cyrus V. Das. But the second plaintiff decided to engage Mr. Wang, another learned counsel, to act for him. That was permissible and perfectly in order. And there was no necessity to file a formal application to this court for separate representation. Suffice that on 2 July 2003, this court was informed of the separate representation. The choice was entirely that of the second plaintiff to appoint Mr. Wang as his counsel. It is of no concern to this court.

It must be borne in mind that at any time after 13 June 2003, both the plaintiffs were entitled to discharge the firm of solicitors known as Messrs. Shook Lin & Bok and replace it with another firm of solicitors. In Kuala Lumpur, there are plenty of law firms for the picking. The choice would entirely be at the discretion of both the plaintiffs. But on 2 July 2003, during the hearing of the *inter partes*, both the plaintiffs still retained the services of the firm of solicitors known as Messrs. Shook Lin & Bok and that would be their prerogative. There was nothing sinister about this and nothing sinister should be read into it. But, the second plaintiff had a change of heart. The second plaintiff on 2 July 2003 decided to engage the services of Mr. Wang as his counsel while the first plaintiff was still happy with the services of Dato' Dr. Cyrus V. Das as his counsel. Again nothing sinister can be read into this perfectly legitimate exercise.

The second plaintiff wanted Mr. Wang to be his counsel on 2 July 2003 and Mr. Wang was willing to act accordingly and he did just that. In *Oswald Hickson Collier & Co v. Carter-Ruck* [1982] 126 Sol. Jo 120, CA, it was held that in the particular circumstances of that case that it would be contrary to public policy to prevent a solicitor from acting for a client who wanted him to act and that the reliance on a restraint of trade clause in the partnership deed was wrong. Likewise here, although the facts are different, it would certainly be contrary to public policy to prevent Mr. Wang from acting as counsel for the second plaintiff who was interested in engaging the services of Mr. Wang during the *inter partes* hearing on 2 July 2003.

Now, by the giving and acceptance of the retainer, Mr. Wang had acquired his authority to act for the second plaintiff and to bind the second plaintiff as his client. The second plaintiff becomes bound under a contract to Mr. Wang and the latter has the right to demand for his costs (*Bolden v. Nicholay* [1857] 3 Jur NS 884; and *Adams v. London Improved Motor Coach Builders Ltd* [1921] 1 KB 495, CA).

There is no requirement that a retainer has to be in writing (*Owen v. Ord* [1828] 3 C & P 349; *Wiggins v. Peppin* [1839] 2 Beav 403; and *Bird v. Harris* [1881] WN 5, CA). But it is prudent to reduce the retainer in writing (*Tomlinson v. Gell* [1837] 6 Ad & El 564). Indeed it is desirable that the retainer should be reduced into writing so that the terms may be made clear and beyond dispute (per Lord Tenterdon CJ in *Owen v. Ord (supra)*). In this direction, it is also ideal to refer to the case of *Rowe v. Ward* [1844] 4 LTOS 191.

As a client, the second plaintiff was certainly entitled to terminate the services of Dato' Dr. Cyrus V. Das as his counsel and such a termination cannot constitute a breach of contract. At its lowest ebb, whether a breach of contract has been committed or not would only be confined to the payment of costs. It must be emphasised that no advocate and solicitor in Malaysia can insist that he should represent a particular client. It is the client who decides which particular advocate and solicitor he wants to employ and engage. In short, the counsel cannot insist on representing the client (*Re Galland* [1885] 31 Ch D 296 at 300, CA). Seen in this context, it was perfectly legitimate for the second plaintiff to engage Mr. Wang as his counsel on 2 July 2003 during the hearing of the *inter partes*. Incidentally, on 2 July 2003, the defendant retained the services of the firm of solicitors by the name of Messrs. H.S. Lim & Malik and Mr. Wong

acted as the learned counsel for the defendant. What Mr. Wong did was no different from what Mr. Wang did. It was a classic case of the pot calling the kettle black.

Dato' Dr. Cyrus V. Das, Mr. Wang and Mr. Wong are Advocates and Solicitors under the Legal Profession Act 1976 (Act 166) and they have the "exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those courts; and as between themselves shall have the same rights and privileges without differentiation" (see s. 35(1) of the Legal Profession Act 1976 (Act 166)). These legal personalities and their clients may "either before or after or in the course of the transaction of any non-contentious business, make an agreement" as to their remuneration (see s. 114(1) of the Legal Profession Act 1976 (Act 166)). In regard to contentious business, s. 116(1) of the Legal Profession Act 1976 (Act 166) enacts as follows:

> **Advocate and solicitor may enter agreement for costing contentious business**
>
> 116(1) Subject to the provisions of any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either that the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.

Be that as it may, the remuneration packages of these three legal personalities are of no concern to this court. They are now before this court and they have performed rather well. They have an obligation to act with "strict fairness and openness" and any failure to fulfil this obligation would render them liable for any resulting loss to their clients (*Nocton v. Lord Ashburton* [1914] AC 932, HL; and *Re Burford, Burford v. Clifford* [1932] 2 Ch 122, CA). They have an obligation to be "skilful and careful" (*Spector v. Ageda* [1973] Ch 30, [1971] 3 All ER 417). They must put their skill and knowledge to the fore.

It must be recalled that the defendant had entered into a separate agreement with the second plaintiff. The first plaintiff was not involved at all and it was said that the first plaintiff was not even aware of that separate agreement. The ignorance of the first plaintiff in regard to that separate agreement gave rise to the divergence of legal interests between both the plaintiffs. The affidavit of the second defendant in encl. 12 that was affirmed

on 2 July 2003 confirmed beyond per adventure that the first plaintiff was not aware of the existence of that separate agreement. This was a classic case where the conflict of interest between both the plaintiffs showed its ugly head for this court to perceive and ponder. The affidavit of the second defendant in encl. 12 speak a thousand words. *Goold* was a case where a conflict of interest might arise at the trial. In the present case, the conflict of interest has already arisen. A separate counsel is called for and it is certainly warranted. Mr. Wang, the learned counsel for the second plaintiff, would be able to pit his skill and knowledge during the inter partes hearing. The interest of justice demands separate counsel to represent the second plaintiff and Mr. Wang fits the bill perfectly, so to speak.

I must now make my ruling pertaining to the preliminary objection. It would be as follows:

I dismissed the preliminary objection with costs.